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FILTER WARS: THE FIGHT TO DETERMINE FILTERING RIGHTS UNDER THE FAMILY MOVIE ACT AND THE DIGITAL MILLENNIUM COPYRIGHT ACT

*Amanda A. Garcia**

The development of filtering and streaming technology over the last twenty years has put in to question the purpose and intent of legislation meant to encompass those technologies. This Comment considers the exclusive rights of copyright owners in their protected works, and the circumvention of the encryptions placed on DVD and Blu-Ray discs to prevent the unauthorized decryption, filtering, and streaming of those works. This Comment will weigh the rights of creators of expressive works, such as films and television shows, against the rights of the purchasers to filter the works. A new defense to circumvention liability will be raised and rejected by the Ninth Circuit, and this Comment will conclude by explaining why the rights of purchasers should come secondary to the rights of copyright owners. Finally, this Comment will clarify why it is essential to the public interest that filtering and streaming services comply with current interpretations of the Digital Millennium Copyright Act and the Family Movie Act, and will propose alternative solutions to avoid liability under these statutes.

*J.D. Candidate at Loyola Law School, Los Angeles, 2019. The author would like to thank the members of the Editorial Board of the Entertainment Law Review of Loyola Law School, Los Angeles for their assistance in publishing this Comment. The author would also like to thank her parents, Rachel Heredia-Garcia and Gilbert Garcia, for their continued support, guidance, and encouragement throughout the years.

You no longer have to accept the unacceptable in movies and TV. Want to skip the nudity in *Game of Thrones*? Go ahead. Don't like the mature language in *Stranger Things*? Mute it. Want less blood and gore in *Hacksaw Ridge*? VidAngel lets you skip and mute any objectionable content, all in the privacy of your home.¹

I. INTRODUCTION

"Star Wars is still Star Wars, even without Princess Leia's bikini scene," said Judge Huritz, who presided over a recent Ninth Circuit Court of Appeals ("Circuit Court") case that addressed the issue of whether a filtering service would survive to last another day or have its streaming business permanently enjoined.² VidAngel, Inc. ("VidAngel") recently filed suit in a United States District Court ("District Court") against four Hollywood studios, seeking a declaration as to each of its lawful services after a series of losses in Los Angeles federal court.³ This series of lawsuits began when Disney Enterprises, Inc., Lucasfilm Ltd. LLC, Twentieth Century Fox Film Corporation, and Warner Bros. Entertainment, Inc. (the "Studios") filed for an injunction against VidAngel's "family-friendly" streaming service, which filtered movies and television shows for objectionable content like sex, violence, language, and nudity over existing streaming services like Amazon, Netflix, and HBO GO.⁴ The Ninth Circuit Court of Appeals rejected VidAngel's fair use and Family Movie Act defenses to copyright infringement and circumvention liability, and granted the injunction in favor of the Studios.⁵

1. VIDANGEL, <https://www.vidangel.com/> [<https://perma.cc/773W-7USH>] ("You can skip or mute content from entire categories, like Language or Violence. You can skip or mute content from sub-categories, such as profanity, or only the graphic violence portion of the Violence category. You can skip or mute content using individual filters, including specific words, or certain scenes.").

2. *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 861 (9th Cir. 2017).

3. Ben Winslow, *VidAngel Sues Studios, Asking Judge to Declare Its Movie Filtering Methods Legal*, FOX 13 (Sept. 2, 2017, 9:52 AM), <http://fox13now.com/2017/09/02/vidangel-sues-studios-asking-judge-to-declare-its-movie-filtering-methods-legal/> [<https://perma.cc/TT8L-KX4U>].

4. *Id.*; Gene Maddaus, *Judge Orders VidAngel to Shut Down*, VARIETY (Dec. 12, 2016, 7:15 PM), <http://variety.com/2016/biz/news/vidangel-shut-down-copyright-violation-1201940368/> [<https://perma.cc/BY3V-B67T>].

5. Ben Winslow, *Federal Appeals Court Upholds Injunction Against VidAngel's Streaming Service*, FOX 13 (Aug. 24, 2017, 2:48 PM), <http://fox13now.com/2017/08/24/federal-appeals-court-upholds-injunction-against-vidangels-streaming-service/> [<https://perma.cc/E83J-GKEL>].

VidAngel's appeal presented two issues of first impression: (1) "whether the Family Movie Act of 2005 exempt[ed] VidAngel from liability for copyright infringement;" and (2) whether the anti-circumvention provision of the Digital Millennium Copyright Act covered the Studios' technological protection measures, which controlled both the access to and the use of the copyrighted works.⁶

While VidAngel adamantly maintains that it provides the option of cleaner content to families in the privacy of their homes, the Circuit Court ultimately decided that allowing VidAngel's services to thrive would create a loophole in existing copyright law and provide no recourse to copyright owners where infringing copies originated from a lawful source.⁷ VidAngel now stands to lose its business in the face of the injunction:

VidAngel has just filed a petition for Chapter 11 protection to pause the Los Angeles lawsuit in order to reorganize its business around [a] new streaming model. VidAngel is still up and running and generating millions in revenue Chapter 11 is simply a reorganization and part of our legal and business strategy. Per federal law, Chapter 11 reorganization automatically pauses our lawsuit with Disney and the other plaintiffs VidAngel is not going away.⁸

Part II of this Comment provides the legal background from which this case draws its authority, covering the purpose of copyright law, defenses to copyright infringement, and unlawful circumvention. Furthermore, Part II provides examples of relevant case law and legislative interpretation that offers contextual background for the case at hand. Part III provides a summary of the factual background surrounding the case, delving into the mechanics of VidAngel's filtering and streaming service. Part IV covers the procedural background of the District Court's decision, and Part V examines the Circuit Court's decision. Finally, Part VI analyzes the reasons why VidAngel's assertions are misinterpretations of what copyright law was created to protect

6. *VidAngel, Inc.*, 869 F.3d at 852.

7. Winslow, *supra* note 5.

8. *Message from the VidAngel CEO Neal Harmon*, VIDANGEL, <https://blog.vidangel.com/chapter11/> [<https://perma.cc/42XR-XUGB>] ("VidAngel has filed a petition for relief under Chapter 11 to pause the Los Angeles litigation in order to reorganize its business around its new streaming service that works with Netflix, Amazon and HBO (other services coming in the future).").

and provides alternatives to its current filtering and streaming service. Part VI also examines the legislative history behind VidAngel's arguments and offers a business model that can be utilized in place of VidAngel's model. This Comment concludes by explaining why VidAngel's service is unlawful, and why failing to enjoin it would have been a detriment to copyright law and a burden on all United States copyright owners—from entertainment titans, like the Studios, to the most modest of freelance artists.

II. BACKGROUND OF RELEVANT LAW

A. The Copyright Act: Exclusive Rights and the Fair Use Defense

The United States Copyright Act (the “Copyright Act”) gives copyright owners the exclusive right to use or authorize others to use their copyrighted works, including the right to reproduce and publicly perform their copyrighted works.⁹ In order to constitute a “copy” for purposes of the exclusive reproduction right under the Copyright Act, an “infringing work must be fixed in some tangible form, ‘from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.’”¹⁰ A “public performance” under the Copyright Act occurs when someone “transmits or otherwise communicates a performance or display of the work . . . to the public, by means of any device or process.”¹¹ Anyone who violates any of the exclusive rights held by the copyright owner of a work is considered to be a copyright infringer.¹²

“Fair use” was enacted under the Copyright Act as an affirmative defense to copyright infringement and provides for various non-infringing uses of an original work.¹³ The relevant portion of the statute reads:

9. 17 U.S.C. § 106 (2002).

10. *Disney Enters., Inc. v. VidAngel, Inc.*, 224 F. Supp. 3d 957, 970 (C.D. Cal. 2016), *aff'd*, 869 F.3d 848 (9th Cir. 2017); 17 U.S.C. § 101 (2010).

11. 17 U.S.C. § 101 (2010); *Warner Bros. Entm't, Inc. v. WTV Sys.*, 824 F. Supp. 2d 1003, 1009 (C.D. Cal. 2011).

12. 17 U.S.C. § 501 (2002).

13. 17 U.S.C. § 107 (1992).

[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching [], scholarship, or research, is not an infringement of a copyright. In determining whether the use made of a work in any particular case is a fair use[,] the factors to be considered shall include: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁴

Below is an explanation of the four fair use factors considered when a court evaluates a new work for potential copyright infringement.

1. Purpose and Character of the Use

The first fair use factor considers “the purpose and character of the use” and asks whether the new work is transformative in its own right, or whether it simply supplants the original work.¹⁵ Fair use favors new works that are created for non-commercial purposes, and which give new meaning, message, or expression to the original work.¹⁶ The Circuit Court has held that works are transformative when “the works use copyrighted material for purposes distinct from the purpose of the original material.”¹⁷ “Commercial use of copyrighted material is ‘presumptively an unfair exploitation’” of the exclusive right that belongs solely to the copyright owner of the work.¹⁸

14. *Id.*

15. *VidAngel, Inc.*, 224 F. Supp. 3d at 972.

16. *Id.* at 972–73.

17. *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622, 629 (9th Cir. 2003).

18. *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 530 (9th Cir. 2008) (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)).

2. Nature of the Copyrighted Work

The second fair use factor considers “the nature of the copyrighted work”¹⁹ and the “value of the materials used.”²⁰ This factor evaluates the nature of the work that has been copied, and asks whether it is “creative, imaginative, or represents an investment of time in anticipation of a financial return” by the original author.²¹ This factor examines whether the nature of the new work is highly creative or expressive, and what the value of the materials used were.²² Taking into consideration that some works are “closer to the core of intended copyright protection than others,” fair use favors more original and creative works.²³

3. Amount and Substantiality of the Portion Used

The third fair use factor considers the quantity of the original work taken by the copy, and “the quality and importance of the portion taken.”²⁴ If the new work takes substantially from the original work, it is more difficult to claim fair use.²⁵ The Supreme Court in *Campbell v. Acuff-Rose Music, Inc.* stated that the “verbatim copying of ‘a substantial portion of the infringing work’ is a relevant inquiry” for this factor.²⁶ The Court further explained that “a [new] work composed primarily of an original [work], particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original [work].”²⁷ Since “[t]he heart of a cop-

19. 17 U.S.C. § 107(2).

20. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (citing *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)).

21. *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992).

22. *VidAngel, Inc.*, 224 F. Supp. 3d at 973.

23. *Id.*

24. *Id.*; *Acuff-Rose*, 510 U.S. at 586.

25. *VidAngel, Inc.*, 224 F. Supp. 3d at 973.

26. *Id.*; *Acuff-Rose*, 510 U.S. at 587.

27. *VidAngel, Inc.*, 224 F. Supp. 3d at 973; *Acuff-Rose*, 510 U.S. at 587–88.

yrighted work is the portion that is the ‘most likely to be...important in licensing serialization,’”²⁸ copying the “heart” of a copyrighted work weighs against a fair use determination.²⁹

4. Effect of the Use on the Potential Market for or Value of the Copyrighted Work

The fourth fair use factor considers “current market harm and ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant...would result in a substantially adverse impact on the potential market’ for the original.”³⁰ “The Ninth Circuit has held that when ‘the intended use is for commercial gain,’ the likelihood of market harm ‘may be presumed.’”³¹ This factor considers whether the new work will replace or substantially impact the demand for the original work in the market, which weighs against a finding of fair use.³²

B. The Digital Millennium Copyright Act

The Digital Millennium Copyright Act (the “DMCA”) was introduced in 1999 to address, among other things, the circumvention of copyright protection systems,³³ and was “designed to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age.”³⁴ Known as the anti-circumvention provision of the DMCA, 17 U.S.C. § 1201(a)(1)(A) provides that “[n]o person shall circumvent a technological measure that effectively controls access to a work” protected by the Copyright Act.³⁵ A technological measure “effectively controls access to a copyrighted work” under the

28. *VidAngel, Inc.*, 224 F. Supp. 3d at 973; *Acuff-Rose*, 510 U.S. at 587.

29. *VidAngel, Inc.*, 224 F. Supp. 3d at 973; *see Acuff-Rose*, 510 U.S. at 587; *Passport Video*, 349 F.3d at 630; *L.A. News Serv. v. Tullo*, 973 F.2d 791, 798 (9th Cir. 1992).

30. *VidAngel, Inc.*, 224 F. Supp. 3d at 974; *Acuff-Rose*, 510 U.S. at 590.

31. *VidAngel, Inc.*, 224 F. Supp. 3d at 974; *Leadsinger, Inc.*, 512 F.3d at 531.

32. *VidAngel, Inc.*, 224 F. Supp. 3d at 974.

33. 17 U.S.C. § 1201 (1999).

34. S. REP. NO. 105-190, at 1–2 (1998).

35. 17 U.S.C. § 1201(a)(1)(A).

DMCA if “the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.”³⁶ The term “circumvention” refers to the decryption of an encrypted work without the authority of the copyright owner.³⁷ Section 1201(a)(3)(A) “exempts from circumvention liability only ‘those whom a copyright owner authorizes to circumvent an access control measure, not those whom a copyright owner authorizes to access the work.’”³⁸ In other words, the exemption applies only to those who have the authority to decrypt the encrypted work, such as a valid licensee, not to those who have the authority to view the work, such as a valid purchaser of a DVD or Blu-ray disc.³⁹ If a movie studio encrypts a DVD “so that it cannot be copied without special software . . . and an individual uses his own software to ‘crack’ the encryption and make copies without permission, the studio may pursue the copier both for infringement under the Copyright Act, and separately, for his circumvention of the encryption . . . under the DMCA.”⁴⁰

C. The Family Movie Act

The Family Movie Act of 2005 (the “FMA”) was passed in the wake of litigation against two filtering companies, CleanFlicks, LLC (“CleanFlicks”) and ClearPlay, Inc. (“ClearPlay”).⁴¹ The FMA was meant to provide an exemption from copyright infringement, and to allow families to

36. 17 U.S.C. § 1201(a)(3)(B).

37. 17 U.S.C. § 1201(a)(3)(A); *VidAngel, Inc.*, 869 F.3d at 863.

38. 17 U.S.C. § 1201(a)(3)(A); *VidAngel, Inc.*, 869 F.3d at 863 (quoting *Murphy v. Millennium Radio Grp., L.L.C.*, 650 F.3d 295, 300 (3d Cir. 2011)).

39. 17 U.S.C. § 1201(a)(3)(A); *VidAngel, Inc.*, 869 F.3d at 863 (quoting *Murphy*, 650 F.3d at 300).

40. 17 U.S.C. § 1201(a)(3)(A); *VidAngel, Inc.*, 869 F.3d at 864 (quoting *Murphy*, 650 F.3d at 300).

41. Brief for the Copyright Alliance as Amicus Curiae Supporting Appellees at 23, *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848 (9th Cir. 2017) (No. 16-56843).

control what they watched in the privacy of their own homes.⁴² The conditions underlying this exemption are that (1) a service can only provide filtering “by or at the direction of a member of a private household,” (2) the filtering must be “a performance in or transmitted to that household for private home viewing,” (3) the filtering service must not create a “fixed copy of the altered version,” and (4) the filtering must be “from an authorized copy of the work.”⁴³

In *Clean Flicks of Colo., LLC v. Soderbergh*, multiple film studios and executives sought an injunction against CleanFlicks for the unauthorized reproduction, filtration, and distribution of their copyrighted works.⁴⁴ CleanFlicks sold and rented out DVD and VHS copies of films that had been filtered to remove objectionable content like sex, profanity, and violence.⁴⁵

With this simple technology, a consumer would buy an original tape or a disk of a movie that had some objectionable content and give it to [CleanFlicks], or [CleanFlicks] would buy the movie upon request by the customer. For a small fee, [CleanFlicks’s] personnel previewed the movie and marked the timing of objectionable content. The original video was then re-recorded on a new tape or disk while removing objectionable content as seamlessly as possible, by suspending recording for the time of objectionable content, muting the audio input for this time, or replacing the content with ambient noise. No additional content was ever added to the final product.⁴⁶

The *Clean Flicks of Colo.* court refused to apply the FMA exemption to CleanFlicks’s service because it made “fixed copies of altered works” and

42. Brief for U.S. Representatives John Hostettler and Spencer Bachus as Amici Curiae Supporting Defendant-Appellant at 11–12, *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848 (9th Cir. 2017) (No. 16-56843).

43. 17 U.S.C. § 110(11) (2005).

44. *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236 (D. Colo. 2006).

45. *Id.* at 1237–38; see also Larry Williams, *Cleaning Up Hollywood: Sanitized Tapes, DVDs Have Directors Crying Foul*, CHI. TRIB. (Oct. 1, 2002), http://articles.chicagotribune.com/2002-10-01/features/0210010145_1_dvds-religious-audience-hollywood-studios [https://perma.cc/2GAH-63SX].

46. Mark D. Shtilerman, *Who Can Clean the Flick?: On Remedies for Infringement of Unused Derivative Works*, 55 J. COPYRIGHT SOC’Y U.S.A. 497, 503–04 (2008).

resold those unauthorized copies.⁴⁷ The court granted the injunction, and CleanFlicks's business was effectively shut down.⁴⁸

In *Huntsman v. Soderbergh*, ClearPlay survived an injunction by distinguishing itself from filtering services like CleanFlicks.⁴⁹ Instead of reselling filtered versions of copyrighted works, ClearPlay offers filtering software that works in conjunction with a consumer's lawful purchase of a streaming service or physical disc.⁵⁰ For a monthly fee, customers can purchase ClearPlay's software, which cuts objectionable scenes and sounds from a DVD while a work is playing on a computer.⁵¹ ClearPlay also offers DVD players for purchase that are pre-equipped with this software.⁵² The

47. *Clean Flicks of Colo.*, 433 F. Supp. 2d at 1240. Cf. Williams, *supra* note 45 ("‘It is unconscionable, and unethical, to take someone else’s hard work, alter it and profit from it,’ said Oscar-winning director Steven Soderbergh, a vice president of [Directors Guild of America],” equating CleanFlicks’s services to “ripping pages out of a book, leaving the author’s name on it[,] and then [re-]selling it[.]”).

48. *Clean Flicks of Colo.*, 433 F. Supp. 2d at 1243–44.

49. *Huntsman v. Soderbergh*, No. CIV.A02CV01662RPM MJW, 2005 WL 1993421, at *1–2 (D. Colo. Aug. 17, 2005); Marius Meland, *ClearPlay Cleared in Copyright Suit*, LAW360 (Aug. 21, 2005, 12:00 AM), <http://www.law360.com/articles/3913/clearplay-cleared-in-copyright-suit> [<https://perma.cc/N7SJ-4AMQ>].

50. See *Huntsman*, 2005 WL 1993421, at *1–2; see also Meland, *supra* note 49 (ClearPlay’s website states that it “only releases filtering products that are compliant with copyright law. Keeping our products legal is one of the reasons we have stayed in business for over 17 years. ClearPlay pioneered legal filtering of DVDs and Blu-ray, and is now pioneering legal filtering of streaming movies.”).

51. Williams, *supra* note 45 (“ClearPlay sells a software program for \$9.95 a month that cuts sounds and scenes from DVDs playing on a computer....A ClearPlay-equipped DVD player is available for \$699.88.”); CLEARPLAY, <https://amazon.clearplay.com/> [<https://perma.cc/ZB9U-Z7FM>].

52. Williams, *supra* note 45; see also ClearPlay, *supra* note 51 (“ClearPlay filtering works while the movie is playing.”); David Pogue, *State of the Art: Add ‘Cut’ and ‘Bleep’ To a DVD’s Options*, N.Y. TIMES (May 27, 2004), <http://www.nytimes.com/2004/05/27/technology/state-of-the-art-add-cut-and-bleep-to-a-dvd-s-options.html> [<https://perma.cc/4PUV-BNXS>] (“It’s a sleek black super-thin machine with progressive-scan outputs[.] The machine plays regular, unmodified commercial DVD’s. It skips objectionable scenes based on software filters created by human editors and stored in its memory. (It does not filter DVD bonus materials, homemade DVD’s or copies of DVD’s.) The filters for 100 recent movies come installed[;] [y]ou have to pay for access to the other 500 filters[.] To mask bad language, the player momentarily mutes the soundtrack[;] [t]o filter out violence, sex and ‘disturbing images,’ [] the player simply skips ahead.”).

Huntsman court found that this technology was exempt from infringement under the FMA.⁵³

III. BACKGROUND OF RELEVANT FACTS

A. *The Studios*

The Studios are all in the business of producing and distributing copyrighted motion pictures and television programs (the “works”).⁵⁴ The Studios invest a considerable amount of effort and resources each year to develop their works, and own the exclusive rights within the United States to reproduce and publicly perform them, including the exclusive rights to stream the works over the Internet to the public.⁵⁵ The Studios distribute and license their works for home entertainment over various channels, including “(1) physical Discs; (2) digital download through services like iTunes, VUDU or Amazon Video; (3) on-demand streaming for short-term viewing on a per transaction fee (e.g., iTunes Store or Google Play Store); or (4) subscription on-demand streaming (e.g., Netflix or Hulu).”⁵⁶ The Studios often negotiate higher licensing fees in exchange for granting licensees the exclusive right to show the works to the public during a specific time period.⁵⁷ These online and digital distribution licenses are a large source of revenue for the Studios.⁵⁸

B. *Technological Protection Measures*

The Studios place technological protection measures (“TPMs”) on their works to protect them from unauthorized access and copying.⁵⁹ TPMs, such

53. *Huntsman*, 2005 WL 1993421, at *1–2; Meland, *supra* note 49.

54. *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 852–53 (9th Cir. 2017); *Disney Enters., Inc. v. VidAngel, Inc.*, 224 F. Supp. 3d 957, 964 (C.D. Cal. 2016), *aff’d*, 869 F.3d 848 (9th Cir. 2017).

55. *VidAngel, Inc.*, 869 F.3d at 852–53; *VidAngel, Inc.*, 224 F. Supp. 3d at 964.

56. *VidAngel, Inc.*, 869 F.3d at 852–53; *VidAngel, Inc.*, 224 F. Supp. 3d at 964.

57. *VidAngel, Inc.*, 869 F.3d at 852–53; *VidAngel, Inc.*, 224 F. Supp. 3d at 964.

58. *VidAngel, Inc.*, 869 F.3d at 852–53; *VidAngel, Inc.*, 224 F. Supp. 3d at 964.

59. *VidAngel, Inc.*, 869 F.3d at 853.

as Content Scramble System (“CSS”) and Advanced Access Content System (“AACS”), control access to the copyrighted content on DVD and Blu-ray discs.⁶⁰ This access control allows consumers to watch or playback the content, but not copy the content.⁶¹ The DVD Copy Control Association (“DVD CCA”) licenses the CSS technology to protect works on DVDs, while the Advanced Access Content System Licensing Administrator, LLC (“AACS LA”) develops and licenses the AACS encryption-based technology to protect high-definition content on Blu-ray disks.⁶² CSS and AACS are considered “technological measures that effectively control[] access to a work” for the purposes of the anti-circumvention provision of the DMCA, and circumvention of these technologies is prohibited.⁶³

The use of TPMs began as the digital revolution was emerging in the late 1990s.⁶⁴ The World Intellectual Property Organization (“WIPO”) gathered participating countries and agreed that each country “would enact legal prohibitions against the circumvention of technological protection measures employed to protect copyrighted materials against unauthorized access and use.”⁶⁵ From provisions of these WIPO treaties, the United States Congress birthed what is now the DMCA.⁶⁶ Congress noted that the new law was created to “support new ways of disseminating copyrighted materials to users, and . . . safeguard the availability of legitimate uses of those materials by individuals.”⁶⁷

60. *Id.*

61. *Id.*

62. Brief of DVD Copy Control Association, Inc. and Advance Access Content System License Administrator, LLC as Amicus Curiae in Support of Plaintiffs-Appellees at 2, *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848 (9th Cir. 2017) (No. 16-56843).

63. 17 U.S.C. § 1201(a)(1)(A) (1999); Brief of DVD Copy Control Ass’n, *supra* note 62, at 3; *see Realnetworks, Inc. v. DVD Copy Control Ass’n*, 641 F. Supp. 2d 913, 919 (N.D. Cal. 2009); *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 308 (S.D.N.Y. 2000).

64. Brief of DVD Copy Control Ass’n, *supra* note 62, at 4.

65. *Id.*; *see* World Intellectual Property Organization Performances and Phonograms Treaty art. 18, Dec. 20, 1996, S. TREATY DOC. NO. 105-17 (1997); *see also* World Intellectual Property Organization Copyright Treaty art. 11, Dec. 20, 1996, S. TREATY DOC. NO. 105-17 (1997).

66. Brief of DVD Copy Control Ass’n, *supra* note 62, at 4.

67. *Id.* at 4–5 (citation omitted).

CSS was the first technology developed for this purpose to be applied to the movie content stored on the then-new DVD discs.⁶⁸ CSS originated from a large team of experts “from motion picture, consumer electronics, and information technology companies,” who converged to propose a “scrambling technology and a set of standardized rules regarding compliance with particular requirements” that would govern the technology.⁶⁹ The team’s forward thinking produced “a set of technical specifications and a set of security requirements licensed under a licensing agreement requiring companies building DVD players to comply with those rules in order to build compliant products that would be permitted to decrypt the content recorded on the DVD disks.”⁷⁰ These technical specifications and security requirements have been adopted industry-wide, and the DVD CCA now “licenses the method for studios and other content companies to protect their content using CSS on DVDs.”⁷¹

In the early 2000s, when technology advanced to high-definition displays, the companies from the three industries again worked together, as envisioned by Congress, to create what is now the Blu-ray disc.⁷² AACS technology was created and licensed by AACS LA to provide encryption protection to digital content on Blu-ray discs, similar to the way CSS was developed to provide protection from circumvention on DVDs.⁷³ Individual purchasers of DVDs and Blu-ray discs are not provided “the keys or other cryptographic secrets” necessary for playback of the content on the discs.⁷⁴ Instead, they must use a licensed DVD or Blu-ray disc player, which in turn “must abide by the technical specifications and security requirements imposed by the licenses from DVD CCA or AACS LA.”⁷⁵ Neither the CSS or AACS license allows copying of the content onto a hard drive or other device

68. *Id.* at 5.

69. *Id.*

70. *Id.* at 5–6.

71. *Id.* at 6.

72. *Id.* at 7.

73. *Id.* at 24.

74. *Id.* at 9.

75. *Id.*

for storage, or distribution of the content from the discs over the internet.⁷⁶ VidAngel operates by circumventing these access control measures on the discs in order to copy, store, reproduce, and distribute the content over the internet to the public without the Studios' authorization.

C. *VidAngel's Service*

VidAngel offers customers the option to remove objectionable content from existing movies and TV shows by selecting from categories such as sex, violence, or language.⁷⁷ The customer's selections prompt VidAngel to cut a sex scene entirely from a film, or mute all of the profanity in a television show.⁷⁸ VidAngel operates by lawfully purchasing physical DVDs and Blu-ray discs for each title it offers.⁷⁹ It uses a "commercially available software program" to decrypt and copy each disc, removes the TPMs, and then uploads the digital copy to a computer.⁸⁰ After decryption, the works are converted into http live-streaming format and broken into segments that are tagged for eighty different categories of inappropriate content.⁸¹

To watch a particular movie or television show, a new customer must log in to the VidAngel website to establish their unique user ID, and purchase a physical DVD or Blu-ray disc containing the work.⁸² Once a customer purchases a work, "the disc is removed from [VidAngel's] inventory and the title is transferred to that customer's unique user ID."⁸³ VidAngel "typically maintains possession of the physical [disc] on behalf of the purchasers, but

76. *Id.*

77. Todd Spangler, *Legally Embattled VidAngel Movie-Streaming Site Raises \$10 Million From Fans*, VARIETY (Nov. 10, 2016), <http://variety.com/2016/digital/news/vidangel-raises-10-million-studio-copyright-lawsuit-1201914823/> [<https://perma.cc/6W9J-XXEF>].

78. See Spangler, *supra* note 77; *VidAngel, Inc.*, 224 F. Supp. 3d at 964–65.

79. *VidAngel, Inc.*, 869 F.3d at 853.

80. *Id.*; *VidAngel, Inc.*, 224 F. Supp. 3d at 964.

81. *VidAngel, Inc.*, 869 F.3d at 853.

82. *VidAngel, Inc.*, 224 F. Supp. 3d at 964.

83. *Id.*

purchasers may request that the [disc] be sent to them or retrieve the [disc] from VidAngel's offices."⁸⁴

After purchasing the work, a customer selects objectionable content he or she would like to remove from among the eighty categories available.⁸⁵ Each customer must apply at least one filter in order to view a work.⁸⁶ The filtered version of the work can then be streamed to the customer on any VidAngel-supported device, "including Roku, Apple TV, Smart TV, Amazon Fire TV, Android, Chromecast, iPad/iPhone and desktop or laptop computers."⁸⁷ The price for each individual work is \$20, but the customer may sell the work back to VidAngel for partial credit.⁸⁸ VidAngel's discs are sold over and over again in this manner,⁸⁹ such that the content on one disc can be resold multiple times to different customers (e.g., instead of three people purchasing three separate discs of the same work, VidAngel purchases one disc and makes its content available to three people, effectively reducing the Studios' profit by two purchases).

Within a year of its launch, VidAngel's customer base grew from 4,848 users to over 100,000 monthly active users.⁹⁰ By the time the Studios filed suit to enjoin VidAngel's services, VidAngel was offering more than 2,500 movies and television shows to the public for purchase on its website—more than eighty of which were the Studios' works.⁹¹ For example, VidAngel

84. *Id.*

85. *VidAngel, Inc.*, 869 F.3d at 854.

86. *VidAngel, Inc.*, 224 F. Supp. 3d at 965.

87. *Id.*

88. *Id.* at 964–65 ("Once a user has viewed a stream, the user may re-sell the DVD back to VidAngel for a partial credit of the \$20 purchase price. The sellback price decreases \$1 per night for standard definition (SD) purchases and \$2 per night for high-definition (HD) purchases. Once a user sells the movie back to VidAngel, the user's access to the title is terminated and the remaining balance is credited back to the user's VidAngel account. For example: A \$20 SD disk is owned for 2 nights at \$1 per night and sold back for \$18 in sell-back credit. If a VidAngel customer keeps a DVD for more than 20 days, he or she can either view it through the VidAngel platform in perpetuity, sell it back for \$1 or \$2 in credit, or VidAngel will send the DVD to the customer, if requested.").

89. *VidAngel, Inc.*, 869 F.3d at 854.

90. *Id.* at 854–55.

91. *Id.* at 855; *VidAngel, Inc.*, 224 F. Supp. 3d at 964–65.

began streaming Disney's movie *Star Wars: The Force Awakens* while it was lawfully only available for purchase on DVD or as a digital download.⁹² Likewise, VidAngel began streaming Fox's movies *The Martian* and *Brooklyn* while they were licensed exclusively to HBO for on-demand streaming.⁹³ VidAngel was not authorized by the Studios to copy, perform, or access any of these works.⁹⁴

IV. THE DISTRICT COURT FOUND THAT VIDANGEL'S SERVICES VIOLATED THE ANTI-CIRCUMVENTION PROVISION OF THE DMCA AND INFRINGED ON THE STUDIOS' EXCLUSIVE RIGHTS TO REPRODUCE AND PUBLICLY PERFORM THEIR WORKS

In June 2016, the Studios filed suit against VidAngel seeking a preliminary injunction of VidAngel's services.⁹⁵ The Studios' complaint alleged copyright infringement in violation of their exclusive reproduction and public performance rights, and circumvention of TPMs in violation of the anti-circumvention provision of the DMCA.⁹⁶ In granting an injunction, the District Court considered (1) whether each of the Studios' claims were likely to succeed on their merits; (2) whether the Studios were likely to suffer irreparable harm if the injunction was not granted; (3) whether the balance of hardship tipped in favor of the Studios; and (4) whether the injunction was in the public interest.⁹⁷

92. *VidAngel, Inc.*, 869 F.3d at 854.

93. *Id.*

94. *Id.* at 855.

95. *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 855 (9th Cir. 2017); *Disney Enters., Inc. v. VidAngel, Inc.*, 224 F. Supp. 3d 957, 965 (C.D. Cal. 2016), *aff'd*, 869 F.3d 848 (9th Cir. 2017).

96. *VidAngel, Inc.*, 869 F.3d at 855; *VidAngel, Inc.*, 224 F. Supp. 3d at 963.

97. *VidAngel, Inc.*, 869 F.3d at 856 (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

A. VidAngel's Violation of the Anti-Circumvention Provision of the DMCA

The DMCA states that “to ‘circumvent a technological measure’ means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.”⁹⁸ The purchase of a DVD or Blu-ray disc does not give the purchaser the authority to decrypt the TPMs on the discs.⁹⁹ In fact, courts have previously determined that “the purchase of a DVD only conveys the authority to view the DVD, not to decrypt it.”¹⁰⁰

VidAngel conceded that it used a “commercially available software program” to decrypt the TPMs on the Studios’ discs, and failed to provide evidence that the Studios had explicitly or implicitly authorized DVD or Blu-ray purchasers, including VidAngel, to circumvent the TPMs on their discs in order to view the works on a platform such as VidAngel’s streaming service.¹⁰¹ Thus, the District Court found that VidAngel violated the anti-circumvention provision of the DMCA by decrypting and removing the TPMs that controlled access to the Studios’ copyrighted works on DVDs and Blu-ray discs.¹⁰²

B. VidAngel's Copyright Infringement

VidAngel’s circumvention of the TPMs on the Studios’ discs allowed it to create unauthorized digital copies of each work, resulting in a copyright infringement action.¹⁰³ To succeed in its copyright infringement claim, the Studios were required to show that they had valid copyright ownership in the works and that VidAngel violated one or more of the Studios’ exclusive rights as copyright owners.¹⁰⁴ The District Court found that the Studios had demonstrated ownership of the copyrighted works by providing certificates

98. 17 U.S.C. § 1201 (1999).

99. 321 Studios v. MGM Studios, Inc., 307 F. Supp. 2d 1085, 1096 (N.D. Cal. 2004).

100. *VidAngel, Inc.*, 224 F. Supp. 3d at 967.

101. *Id.*

102. *Id.*

103. *VidAngel, Inc.*, 869 F.3d at 855; *VidAngel, Inc.*, 224 F. Supp. 3d at 966–69.

104. *VidAngel, Inc.*, 224 F. Supp. 3d at 969; *see* 17 U.S.C. § 106 (2002).

of registration issued by the United States Copyright Office.¹⁰⁵ Since a certificate of registration is “prima facie evidence of the validity of the copyright and of the facts stated in the certificate,”¹⁰⁶ the only factor at issue was whether VidAngel violated one of the Studios’ exclusive rights under 17 U.S.C. § 106.¹⁰⁷

1. VidAngel Violated the Studios’ Exclusive Right to Reproduce Their Works

The Copyright Act grants copyright owners the exclusive right “to reproduce the copyrighted work” under § 106(1).¹⁰⁸ In *MAI Systems Corp. v. Peak Computer, Inc.*, the Circuit Court held that transferring digital work “‘from a permanent storage device to a computer’s RAM [or storage]’ infringes the reproduction right.”¹⁰⁹ As the District Court noted, while “the *MAI Sys. Corp.* decision addressed the infringement of computer software, the same analysis applies to the digital transfer [of] other types of copyrighted work.”¹¹⁰ VidAngel admitted to making copies of the Studios’ works “onto a computer system and third-party servers.”¹¹¹ VidAngel decrypted the discs, created “intermediate” files that it tagged for over eighty types of objectionable content, broke them into approximately 1,300 fragments, and then encrypted those fragments and stored them in “a secure, access-controlled location in the cloud.”¹¹² The Ninth Circuit has previously specified that “on its face, the language of 17 U.S.C. § 106(1) unambiguously encompasses and proscribes ‘intermediate copying.’”¹¹³ In order to

105. *VidAngel, Inc.*, 224 F. Supp. 3d at 969.

106. 17 U.S.C. § 410(c) (1976).

107. *VidAngel, Inc.*, 224 F. Supp. 3d at 969; *see* 17 U.S.C. § 106.

108. 17 U.S.C. § 106(1).

109. *VidAngel, Inc.*, 224 F. Supp. 3d at 969 (quoting *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993)).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 970 (quoting *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, 1518 (9th Cir. 1992)).

constitute a “copy” under the Copyright Act, the “infringing work must be fixed in some tangible form, ‘from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.’”¹¹⁴ Because VidAngel’s fragmented copies were able to be perceived with the aid of VidAngel’s software, the District Court found that VidAngel’s service amounted to copyright infringement for violating the Studios’ exclusive right to copy and reproduce its own works.¹¹⁵

2. VidAngel Violated the Studios’ Exclusive Right to Publicly Perform Their Own Works

Under § 106(4), copyright owners are also granted the exclusive right “to perform [their] copyrighted work[s] publicly.”¹¹⁶ A “public performance” is when someone “transmits or otherwise communicates a performance or display of the work . . . to the public, by means of any device or process.”¹¹⁷ A transmission is made to the public if “the relationship between . . . the transmitter of the performance, and the audience . . . is a commercial, ‘public’ relationship[,] regardless of where the viewing takes place.”¹¹⁸

While VidAngel asserted that its service did not engage in unlawful public performances “because [it] stream[ed] filtered versions of motion pictures created at the direction of and owned by its customers,” the District Court maintained that VidAngel’s customers were never the lawful owners of the digital content streamed via VidAngel’s service.¹¹⁹ The ownership granted to the lawful purchaser of a DVD or Blu-ray disc extends only to the physical disc, not to the digital content on the disc.¹²⁰ Furthermore, VidAngel streamed the works from a master copy stored on its server, not from a

114. *Sega Enters.*, 977 F.2d at 1518; *see* 17 U.S.C. § 101 (2010).

115. *VidAngel, Inc.*, 224 F. Supp. 3d at 970.

116. 17 U.S.C. § 106(4).

117. 17 U.S.C. § 101; *VidAngel, Inc.*, 224 F. Supp. 3d at 970 (quoting *Warner Bros. Entm’t, Inc. v. WTV Sys.*, 824 F. Supp. 2d 1003, 1009 (C.D. Cal. 2011)).

118. *VidAngel, Inc.*, 224 F. Supp. 3d at 970 (quoting *Warner Bros.*, 824 F. Supp. 2d at 1010).

119. *VidAngel, Inc.*, 224 F. Supp. 3d at 970–71.

120. *Id.*

disc lawfully purchased and owned by the customer.¹²¹ In other words, ownership of a DVD or Blu-ray disc only gives a purchaser authorization to view the content on the DVD or Blu-ray disc, “not to decrypt it for the purpose of viewing it on an alternative platform” like VidAngel’s streaming service.¹²² Therefore, the District Court held that VidAngel had unlawfully streamed unauthorized copies of the Studios’ works to the public in violation of the Studios’ exclusive public performance rights.¹²³ The District Court concluded by stating that the Studios’ had a strong likelihood of success on their copyright infringement claim.¹²⁴

C. VidAngel’s FMA Defense

VidAngel denied copyright infringement and violation of the anti-circumvention provisions of the DMCA, and instead raised two defenses to the Studios’ claims: (1) legal authorization under the FMA, and (2) fair use.¹²⁵ The District Court found that “[n]either the plain language nor the legislative history of the FMA support VidAngel’s position,”¹²⁶ and pointed out that, in fact, the legislative history directly contradicts VidAngel’s assertion “that the FMA provides an exemption to the anti-circumvention provisions of the DMCA.”¹²⁷ Senator Orrin Hatch, who introduced the FMA to the United States Senate, specified that the FMA does not provide any exemption or defense to the anti-circumvention provision of the DMCA.¹²⁸ In other words, the FMA has not been recognized as a defense to unlawful circumvention under the DMCA. Instead, the FMA provides an exemption from copyright infringement for filtering limited portions of movies and creating a computer

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *VidAngel, Inc.*, 869 F.3d at 855; *VidAngel, Inc.*, 224 F. Supp. 3d at 971–74.

126. *VidAngel, Inc.*, 224 F. Supp. 3d at 968.

127. *Id.*

128. 150 CONG. REC. 11,852, at S11,853 (daily ed. Nov. 24, 2004) (statement of Sen. Hatch).

program or other technology that enables filtering, like ClearPlay's technology, so long as (1) the filtration is done by or at the direction of a member of a private household, (2) the performance or transmission of the filtered work comes from an authorized copy of the movie, and (3) no fixed copy of the filtered version is created by the computer or other technology, meaning it is not stored on a computer, device, or in the cloud.¹²⁹

Here, the District Court held that VidAngel streamed the works to its customers from an unauthorized copy, because it streamed from a digital copy that it acquired by circumventing TPMs on the Studios' discs in violation of the anti-circumvention provisions of the DMCA.¹³⁰ In other words, because VidAngel unlawfully decrypted the discs instead of lawfully acquiring a license from the Studios to decrypt the discs, its performance and reproduction of those works were unauthorized. Further, the court found that the authorization requirement is a "clear indication that the FMA is not intended to displace a copyright holder's exclusive reproduction right."¹³¹

Additionally, the District Court rejected VidAngel's argument "that a filtering service that complies with the FMA, need not satisfy any other provision[] of the Copyright Act" because it was in direct contradiction to the last sentence of the FMA, which provides that "[n]othing in [the FMA] shall be construed to imply further rights under section 106 of [the Copyright Act], or to have any effect on defenses or limitations on rights granted under any other section of [the Copyright Act]."¹³² Thus, the District Court found that VidAngel's service did not comply with the express language of the FMA, and that the FMA did not provide a defense to VidAngel's copyright infringement.¹³³

129. 17 U.S.C. § 110 (2005); *VidAngel, Inc.*, 224 F. Supp. 3d at 971; *VidAngel, Inc.*, 869 F.3d at 857.

130. *VidAngel, Inc.*, 224 F. Supp. 3d at 971.

131. *Id.* at 972.

132. 17 U.S.C. § 110; *VidAngel, Inc.*, 869 F.3d at 858; *VidAngel, Inc.*, 224 F. Supp. 3d at 972.

133. *VidAngel, Inc.*, 224 F. Supp. 3d at 972.

D. VidAngel's Fair Use Defense

1. Purpose and Character of the Use

VidAngel asserted that its use of the Studios' copyrighted works were fair use.¹³⁴ The first fair use factor considers "the purpose and character of the use."¹³⁵ This factor asks "to what extent the new work is transformative" from the original, whether it supplants the original, and whether the new work's purpose is commercial or not.¹³⁶ The Supreme Court has held that a use is transformative if it "adds something new, with a further purpose or different character, altering the [original work] with new expression, meaning, or message."¹³⁷ VidAngel admitted that its use was commercial and that it profited from the Studios' works.¹³⁸ However, VidAngel argued that its filtering service was transformative because it filtered the Studios' works for at least one category of objectionable content before streaming them to VidAngel customers.¹³⁹ The District Court rejected this argument, finding that "VidAngel's service [did] not add anything to [the Studios'] works," and "simply [omitted] portions" of the works.¹⁴⁰ In *Clean Flicks of Colo.*, the court rejected a fair use defense asserted by defendants who provided a service similar to VidAngel's service.¹⁴¹ The *Clean Flicks of Colo.* court ruled that the "defendants' editing of objectionable content was not transformative because it added nothing to the copyrighted works, and only removed 'a small percentage of most of the films.'"¹⁴²

134. *Id.*

135. 17 U.S.C. § 107(1) (1992).

136. *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 800 (9th Cir. 2003) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

137. *Acuff-Rose*, 510 U.S. at 579.

138. *VidAngel, Inc.*, 224 F. Supp. 3d at 972.

139. *Id.*

140. *Id.*

141. *Id.* See generally *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236 (D. Colo. 2006).

142. *VidAngel, Inc.*, 224 F. Supp. 3d at 973; *Clean Flicks of Colo.*, 433 F. Supp. 2d at 1241.

The District Court found that VidAngel's use of the Studios' works served the "same intrinsic entertainment value that is protected by [the Studios'] copyrights," and was therefore not transformative.¹⁴³ VidAngel's commercial use of the Studios' works, "coupled with [the] non-transformative nature of the [filtered] copies weigh[ed] heavily in favor of the [Studios]" under the first fair use factor.¹⁴⁴

2. Nature of the Copyrighted Work

The second fair use factor considers "the nature of the copyrighted work."¹⁴⁵ The Circuit Court has held that "works such as original . . . motion pictures . . . are creative in nature and thus fit squarely within the core of copyright protection."¹⁴⁶ Thus, the District Court found that this factor weighed in the Studios' favor.

3. Amount and Substantiality of the Portion Used

The third fair use factor considers the quantity and quality of the portion taken from the original work by the copy.¹⁴⁷ The District Court found that VidAngel copied the Studios' works in their entirety.¹⁴⁸ The court rejected VidAngel's argument that customers would never watch *exact* copies of the original works because VidAngel required each user to apply at least one filter to a purchased work before viewing it.¹⁴⁹ The District Court held that "[d]espite the fact that VidAngel's service omits portions of each work,

143. *VidAngel, Inc.*, 224 F. Supp. 3d at 973; *Clean Flicks of Colo.*, 433 F. Supp. 2d at 1241.

144. *VidAngel, Inc.*, 224 F. Supp. 3d at 973.

145. 17 U.S.C. § 107.

146. *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622, 629 (9th Cir. 2003).

147. *VidAngel, Inc.*, 224 F. Supp. 3d at 973; *Acuff-Rose*, 510 U.S. at 586.

148. *VidAngel, Inc.*, 224 F. Supp. 3d at 973.

149. *Id.*

the essential storyline, cinematography, and acting portrayals remain unchanged. These elements are the heart of the movie.”¹⁵⁰ Thus, the third fair use factor weighed in favor of the Studios.¹⁵¹

4. Effect of the Use on the Potential Market for or Value of the Copyrighted Work

The fourth fair use factor considers “current market harm and ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market’ for the original.”¹⁵² Furthermore, “[t]he Ninth Circuit has held that when ‘the intended use is for commercial gain,’ the likelihood of market harm ‘may be presumed.’”¹⁵³ VidAngel asserted that the filtered versions of the works were not substitutes for the Studios’ original works.¹⁵⁴ The District Court rejected this argument, stating that “the fact that VidAngel’s streams are ‘composed primarily’ of [the Studios’] works . . . with little added or changed makes the streams ‘more likely to be a merely superseding use, fulfilling demand for the original.’”¹⁵⁵ Therefore, the District Court found the fourth fair use factor weighed in the Studios’ favor.¹⁵⁶

E. The District Court Granted a Preliminary Injunction in Favor of the Studios

Having found that the Studios’ claims were likely to succeed on their merits and that VidAngel had failed to defend against the claims, the District Court next considered whether a preliminary injunction was appropriate.¹⁵⁷

150. *Id.* at 973–74.

151. *Id.* at 974.

152. *Id.*; *Acuff-Rose*, 510 U.S. at 590.

153. *VidAngel, Inc.*, 224 F. Supp. 3d at 974; *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 531 (9th Cir. 2008).

154. *VidAngel, Inc.*, 224 F. Supp. 3d at 973.

155. *VidAngel, Inc.*, 224 F. Supp. 3d at 974; *see Acuff-Rose*, 510 U.S. at 586.

156. *VidAngel, Inc.*, 224 F. Supp. 3d at 974.

157. *Id.*

1. Likelihood of Imminent Irreparable Injury

The Studios argued that VidAngel's service interfered with their "basic right to control how, when and through which channels consumers can view their copyrighted works."¹⁵⁸ The District Court accepted this argument, finding that VidAngel had operated an "infringing service without the normal licensing restrictions imposed by [the Studios]," and hence interfered with the Studios' "ability to control the use and transmission of their [c]opyrighted works, thereby, causing irreparable injury."¹⁵⁹ The Senior Vice President of Digital Distribution at 20th Century Fox Home Entertainment testified that the Studios' exclusive rights "are critical to providing [the Studios] the opportunity to earn a return on their substantial investments" because the Studios exercise their rights through licensing agreements.¹⁶⁰ The Studios argued that "[b]ecause VidAngel operate[d] without any license and perform[ed] [the Studios'] works during negotiated exclusivity periods[,] it interfere[d] with [the Studios'] exercise of their exclusive rights and frustrate[d] [their] ability to negotiate for similar rights in the future."¹⁶¹

The Studios also claimed that VidAngel's service threatened to harm the Studios' "relationships and goodwill with authorized distributors by undermining their ability to provide licensed offerings."¹⁶² The Studios pointed out "that licensees have complained in partnership meetings, and especially in negotiations, that it is difficult to compete with services like VidAngel that do not act pursuant to licensing restrictions."¹⁶³ It is well established that harm to one's negotiating position and goodwill with licensees is irreparable because it is "neither easily calculable, nor easily compensable."¹⁶⁴ There-

158. *Id.* at 975.

159. *Id.* (citing *Warner Bros.*, 824 F. Supp. 2d at 1012).

160. *VidAngel, Inc.*, 224 F. Supp. 3d at 975.

161. *Id.*

162. *Id.*

163. *Id.* at 976.

164. *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1147 (C.D. Cal. 2012) (quoting *Warner Bros.*, 824 F. Supp. 2d at 1013).

fore, the District Court found that VidAngel's service caused irreparable injury because it undermined the Studios' negotiating position with licensees and damaged their goodwill with licensees.¹⁶⁵

2. Balance of Hardships

The District Court found that the balance of hardships tipped sharply in the Studios' favor.¹⁶⁶ The District Court disregarded VidAngel's plea that an injunction would cause them "to suffer an unimaginable financial hardship" because lost profits suffered from unlawful activity is an argument that "merits little equitable consideration."¹⁶⁷ The Circuit Court has previously held that a defendant "cannot complain of the harm that will befall it when [it is] properly forced to desist from its infringing activities."¹⁶⁸

3. Public Interest

The District Court found that a preliminary injunction was in the public interest.¹⁶⁹ It pointed out that an injunction here "would not prevent VidAngel or any other company from providing a filtering service similar to ClearPlay's," and thus would not "negatively impact the public interest in watching filtered content in private."¹⁷⁰ Furthermore, the court stated that it is "virtually axiomatic that the public interest can only be served by upholding copyright protections and correspondingly, preventing the misappropriation of skills, creative energies, and resources [that have been] invested in the protected work."¹⁷¹

165. *VidAngel, Inc.*, 224 F. Supp. 3d at 976.

166. *Id.* at 977–78.

167. *Id.* (citing *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995)).

168. *Id.*

169. *Id.* at 978.

170. *Id.*

171. *Id.* (quoting *Warner Bros.*, 824 F. Supp. 2d at 1015).

4. The District Court's Decision

VidAngel expressed that it would continue to offer the Studios' works and other future releases, unless enjoined.¹⁷² Thus, after reviewing the factors, the District Court granted a preliminary injunction in favor of the Studios.¹⁷³ VidAngel was enjoined "from copying and 'streaming, transmitting, or otherwise publicly performing or displaying any of [the Studios'] copyrighted works,' 'circumventing technological measures protecting [the Studios'] copyrighted works,' or 'engaging in any other activity that violates, directly or indirectly'" the anti-circumvention provision of the DMCA or the Studios' exclusive use of their copyrighted works.¹⁷⁴

V. THE CIRCUIT COURT AFFIRMED THE DISTRICT COURT'S DECISION

A. Copyright Infringement Claim

When a defendant decrypts the TPMs on a work and then reproduces and publicly performs that work as VidAngel did, "it is liable for both circumvention in violation of § 1201(a)(1)(A) and copyright infringement in violation of § 106."¹⁷⁵ Here, the Circuit Court found that the District Court correctly concluded that VidAngel infringed on the Studios' exclusive reproduction rights in their copyrighted works.¹⁷⁶ The Circuit Court rejected VidAngel's argument that it could lawfully re-sell or rent the works because it had lawfully purchased an original version from which it subsequently made edited copies.¹⁷⁷ The Circuit Court cited to 17 U.S.C. § 109(a), which states that lawful owners of a particular copy of a copyrighted work are only entitled to sell or otherwise dispose of the possession of that copy, not to reproduce the work.¹⁷⁸

172. *Id.* at 969.

173. *Id.* at 979; *see VidAngel, Inc.*, 869 F.3d at 855.

174. *VidAngel, Inc.*, 869 F.3d at 855; *VidAngel, Inc.*, 224 F. Supp. 3d at 979.

175. *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 864 (9th Cir. 2017); *see Murphy v. Millennium Radio Grp., L.L.C.*, 650 F.3d 295, 300 (3d Cir. 2011).

176. *VidAngel, Inc.*, 869 F.3d at 856.

177. *Id.* at 856–57.

178. 17 U.S.C. § 109 (2008); *VidAngel, Inc.*, 869 F.3d at 856–57.

B. DMCA Anti-Circumvention Violation Claim

The Circuit Court additionally found that VidAngel violated the DMCA's anti-circumvention provision by decrypting the access controls on the Studios' discs without authorization.¹⁷⁹ Decrypting an encrypted work, such as a movie on a DVD or Blu-ray disk, without the authorization of the copyright owner is circumvention.¹⁸⁰

VidAngel conceded that the CCS and AACS technologies on the Studios' discs are TPMs which encrypt access controls to protect the copyrighted works.¹⁸¹ These TPMs are placed on the discs to prevent circumvention and allow copyright owners like the Studios to exercise their exclusive rights over their own works. VidAngel admitted that it used software to decrypt these encrypted TPMs and effectively circumvented the access controls to the works.¹⁸² VidAngel argued, however, that "like all lawful purchasers, VidAngel is *authorized* by the Studios to decrypt [the TPMs] to view the discs' content" and is therefore exempt from circumvention liability by section 1201(a)(3)(A) of the DMCA.¹⁸³ As previous noted, section 1201(a)(3)(A) exempts from liability only those whom a copyright owner authorizes to circumvent the encrypted work, not those who have the authority only to view the work.¹⁸⁴ VidAngel argued that as a valid purchaser of the DVDs and Blu-ray disks with the authority to view the copyrighted works, VidAngel was exempt from liability because the Studios impliedly authorized it and all other lawful purchasers of the discs to circumvent the TPMs.¹⁸⁵ In other words, VidAngel argued that because it lawfully purchased a copy of each DVD, it had the authority to decrypt the DVDs.¹⁸⁶ This argument was addressed and rejected in *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, which adopted the Second Circuit approach set

179. *VidAngel, Inc.*, 869 F.3d at 863.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* (emphasis in original).

184. *Id.*

185. *Id.*

186. *Id.*

forth in *Universal City Studios, Inc. v. Corley*.¹⁸⁷ *Corley* rejected the very argument that VidAngel made: “that an individual who buys a DVD has the ‘authority of the copyright owner’ to view the DVD, and therefore is exempted from the DMCA . . . when the buyer circumvents an encryption technology in order to view the DVD on a competing platform.”¹⁸⁸ Instead, section 1201(a)(3)(A) only exempts from circumvention liability those “who would ‘decrypt’ an encrypted DVD with the authority of a copyright owner, not those who would ‘view’ a DVD with the authority of a copyright owner.”¹⁸⁹ Similar to the defendant in *Corley*, VidAngel “‘offered no evidence that [the Studios] have either explicitly or implicitly authorized DVD buyers to circumvent encryption technology’ to access the digital contents of their discs.”¹⁹⁰ Lawful purchasers “have permission only to view their purchased discs with a DVD or Blu-ray player licensed to decrypt the TPMs,” as intended by the exemption.¹⁹¹

The Circuit Court likened VidAngel’s methods—specifically, its use of external software to decrypt the TPMs to obtain digital copies of the discs’ contents—to theft. The Circuit Court maintained that VidAngel’s actions were “exactly like ‘breaking into a locked room’” for which VidAngel was never given the keys, “in order to obtain a copy of a [work].”¹⁹² The exemption applies only to authorized disc players, which are given the “keys” necessary for lawfully decrypting the TPMs.¹⁹³ Furthermore, nothing in the legislative history suggests that VidAngel is exempt from circumvention liability simply because there are authorized ways to access the Studios’

187. *MDY Indus., L.L.C. v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 953 n.16 (9th Cir. 2011); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 444 (2d Cir. 2001).

188. *VidAngel, Inc.*, 869 F.3d at 863 (quoting *Universal City*, 273 F.3d at 444).

189. *Universal City*, 273 F.3d at 444.

190. *VidAngel, Inc.*, 869 F.3d at 863.

191. *Id.*

192. *Id.* at 864–65.

193. *Id.*

works.¹⁹⁴ Therefore, the Circuit Court found that VidAngel's service was an unlawful violation of the anti-circumvention provision of the DMCA.¹⁹⁵

C. The Circuit Court Rejected VidAngel's FMA Defense

The Circuit Court rejected VidAngel's FMA defense and found that "VidAngel does not stream from an authorized copy of the Studios' motion pictures; it streams from the 'master file' copy it created by 'ripping' the movies from discs after circumventing their TPMs."¹⁹⁶ The Circuit Court concluded that statutory reading, statutory context, and legislative history support this interpretation.¹⁹⁷ The most natural statutory reading, the Circuit Court reasoned, "is that the filtered performance or transmission itself must be 'from' an authorized copy of the motion picture," not from an unauthorized reproduction of the work.¹⁹⁸ Furthermore, the FMA was created with the protection of copyright owners' intellectual property rights in mind, and the statute itself states that it should not be construed or interpreted to imply further rights than those provided.¹⁹⁹ Accepting VidAngel's "interpretation of the statute—which permits unlawful decryption and copying prior to filtering—would not preserve 'protection of intellectual property rights,'" and would have lasting effects "on the existing copyright scheme."²⁰⁰ Moreover, Senator Orrin Hatch, who sponsored the FMA, "stated that the [FMA] 'should be narrowly construed' to avoid 'impacting established doctrines of copyright' law."²⁰¹ Senator Hatch insisted that any argument that a greater freedom of viewing and modification under the FMA requires the violation of copyright law protections "should be rejected as counter to legislative

194. *Id.* at 865.

195. *Id.*

196. *Id.* at 860.

197. *Id.* at 857–60.

198. *Id.* at 858; *see* 17 U.S.C. § 110 (2005).

199. *VidAngel, Inc.*, 869 F.3d at 858–59.

200. *Id.*

201. *Id.* at 859–60.

intent or technological necessity.”²⁰² In their statements, Senator Hatch and the House of Representatives collectively identified ClearPlay’s business as a model that was intended to be protected by the FMA.²⁰³ *Huntsman*, the court argued, is the only other case to construe the FMA in a similar context and supports this interpretation.²⁰⁴

D. The Circuit Court Rejected VidAngel’s Fair Use Defense

The Circuit Court further rejected VidAngel’s fair use affirmative defense to copyright infringement after reviewing the fair use factors.²⁰⁵ VidAngel acknowledged that the second and third fair use factors—“the nature of the copyrighted work” and “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”²⁰⁶—weighed against it because its filtered versions of the works were used for entertainment, and kept a substantial portion of the original work intact.²⁰⁷ VidAngel claimed, however, that the District Court abused its discretion as to the first and fourth fair use factors.²⁰⁸ Ultimately the Circuit Court disagreed, holding that the first factor—“the purpose and character of the use”²⁰⁹—weighed against VidAngel because its omission of content from the Studios’ original works did not add anything new to the works and was not transformative.²¹⁰ VidAngel’s policy of simply omitting scenes and dialogue did not change the expression, meaning, or message of the films, and therefore, VidAngel

202. *Id.*

203. *Id.* at 860.

204. *Id.*; see also H.R. Rep. No. 109–33, pt. 1, at 70 (2005); *Derivative Rights, Moral Rights, and Movie Filtering Technology: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 108th Cong. (2004) (ClearPlay CEO testimony). See generally *Huntsman v. Soderbergh*, No. CIV.A02CV01662RPM MJW, 2005 WL 1993421, at *1 (D. Colo. Aug. 17, 2005).

205. *VidAngel, Inc.*, 869 F.3d at 860–62.

206. 17 U.S.C. § 107 (1992).

207. *VidAngel, Inc.*, 869 F.3d at 860–62.

208. *Id.* at 860.

209. 17 U.S.C. § 107.

210. *VidAngel, Inc.*, 869 F.3d at 860–62.

failed to meet its burden as to the first factor.²¹¹ The Circuit Court also found that VidAngel failed to meet its burden as to the fourth factor—“the effect of the use upon the potential market for or value of the copyrighted work”²¹²—because its “service [is] an effective substitute for [the Studios’] unfiltered works” and acts as a replacement in the market.²¹³

E. VidAngel Was Enjoined from Continuing Its Filtering Services

Having found that VidAngel failed in its fair use and FMA defenses against the Studios’ copyright infringement and DMCA violation claims, the Circuit Court next considered whether it was appropriate to affirm the District Court’s preliminary injunction against VidAngel.²¹⁴ The Circuit Court found that refusing to grant an injunction against VidAngel would cause irreparable harm to the Studios because “VidAngel’s service undermines the value of the Studios’ copyrighted works . . . and their goodwill and negotiating leverage with licensees.”²¹⁵ The Circuit Court also found that the balance of equities tipped in favor of the Studios because, firstly, VidAngel’s illegal activities do not merit equitable protection, and secondly, the financial hardship VidAngel would face as a result of being forced to cease its illegal activities pale in priority to the exclusive rights of copyright ownership and the protection of intellectual property rights.²¹⁶ Finally, the Circuit Court found that a preliminary injunction against VidAngel was in the public interest because “‘the public has a compelling interest in protecting copyright owners’ marketable rights to their work[s] and the economic incentive to continue creating television programming’ and motion pictures.”²¹⁷

211. *Id.*

212. 17 U.S.C. § 107.

213. *VidAngel, Inc.*, 869 F.3d at 861.

214. *Id.* at 860–62.

215. *Id.* at 865–66.

216. *Id.* at 866–67.

217. *Id.* at 867.

VI. VIDANGEL'S SERVICES ARE CONTRARY TO THE PURPOSE OF COPYRIGHT LAW, THE ANTI-CIRCUMVENTION PROVISION OF THE DMCA, AND THE FMA

A. *Filtering Is a Red Herring*

VidAngel's Chief Executive Officer, Neal Harmon, insists that VidAngel will aggressively pursue an appeal, if necessary, and has vowed to use "the \$10 million reaped in a crowdfunding campaign to fight the case all the way to the Supreme Court."²¹⁸ VidAngel has framed this issue as Hollywood studios lashing out at a family-friendly filtering service.²¹⁹ However, "the [S]tudios have repeatedly made it clear that [] filtering is not the issue,"—the issue is "the unauthorized streaming and [] protection circumvention" of copyrighted works.²²⁰ In a joint statement, the Studios addressed this red herring, stating that "[t]his case was never about filtering. The [Circuit] Court recognized that the Family Movie Act does not provide a defense to VidAngel's infringing acts of ripping, copying and streaming copyrighted movies and TV shows."²²¹ Indeed, "[r]emove the filtering from [this] case and it's hard to imagine that [a] film studio[] would allow a streaming service to 'buy' and 'buy back' [its] DVDs in this manner unchallenged."²²² In fact, this battle is not just between VidAngel and a handful of large Hollywood companies, it is far more reaching than that. This case is about creators and contributors of all varieties and sizes who rely on the protection of copyright law and the current interpretation of the FMA to make a living and invest in future works.²²³ It is about the "writers, musical composers and recording

218. Gene Maddaus, *Judge Orders VidAngel to Shut Down*, VARIETY (Dec. 12, 2016, 7:15 PM), <http://variety.com/2016/biz/news/vidangel-shut-down-copyright-violation-1201940368/> [https://perma.cc/BY3V-B67T]; Gene Maddaus, *Facing a Shutdown Order, VidAngel Will Start Making Movies*, VARIETY (Dec. 13, 2016, 8:38 PM), <http://variety.com/2016/biz/news/vidangel-studio-fight-supreme-court-injunction-1201941655/> [https://perma.cc/YAS7-KQCG].

219. Jonathan Bailey, *VidAngel: It's Not About Filtering*, PLAGIARISMTODAY (Jan. 12, 2017), <http://www.plagiarismtoday.com/2017/01/12/vidangel-important-case-dont-know> [https://perma.cc/52AN-M9RG].

220. *Id.*

221. Maddaus, *Judge Orders VidAngel to Shut Down*, *supra* note 219.

222. Bailey, *supra* note 220.

223. See Brief for the Copyright Alliance as Amicus Curiae Supporting Appellees at 1–3, *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848 (9th Cir. 2017) (No. 16-56843).

artists, journalists, documentarians and filmmakers, graphic and visual artists, photographers and software developers,” and every freelance and small business copyright owner affected by the unauthorized use of his or her work.²²⁴ If VidAngel’s methods were allowed to obtain legitimacy, the availability of unlicensed, less stringent methods of accessing copyrighted works would undermine the legitimate system in place.

B. VidAngel Misinterprets the FMA

The crux of VidAngel’s misunderstanding of the FMA lies in its belief that once it purchases an authorized copy of a work, it is authorized to use it however it chooses.²²⁵ This is not the correct interpretation of the FMA.²²⁶ The possession or purchase of an authorized copy of work does not authorize a party to subsequently reproduce fixed copies or publicly perform and distribute the works, as VidAngel did.²²⁷ Importantly, the Studios purposefully placed TPMs on their discs to prevent this type of unauthorized control or access to the works.²²⁸ VidAngel has admitted that it decrypts these protection measures, which is a violation of the DMCA, and stores unauthorized fixed copies of the original works on its servers for later distribution to the public via streaming.²²⁹ Moreover, VidAngel has admitted that the Studios have declined to grant it licenses to copy and stream the Studios’ works.²³⁰ Its argument rests on the proposition that “because it has received an implied permission to view the content on a DVD” as a lawful purchaser, it also has permission to circumvent the access control measures on the discs as it sees fit.²³¹ This is not the case. VidAngel has neither received permission to circumvent the TPMs on the Studios’ works, nor does the FMA exempt this

224. *Id.* at 1.

225. *Id.* at 6–8.

226. *Id.*

227. *Id.* at 6–7.

228. *Id.*

229. *Id.* at 15–16.

230. *Id.* at 26.

231. *Id.*

DMCA violation in any implied form.²³² Allowing VidAngel's interpretation to survive "would create a giant loophole in copyright law, sanctioning infringement so long as it filters some content and a copy of the work was lawfully purchased at some point."²³³ As the Circuit Court pointed out, "virtually all piracy of movies originates in some way from a legitimate copy. If the mere purchase of an authorized copy alone precluded infringement liability under the FMA, the statute would severely erode the commercial value of the public performance right in the digital context."²³⁴ In fact, VidAngel is not under attack for providing filtered movies, but for operating an unlicensed streaming service that makes unauthorized fixed reproductions and public performances of other creators' works in violation of their exclusive rights.²³⁵

C. VidAngel's Proclaimed Pure Intentions Are Irrelevant to Copyright Law

VidAngel CEO Neal Harmon insists that VidAngel fights for parents' rights to control what their children see in the privacy of their own homes.²³⁶ But whether or not VidAngel believes its cause is wholesome is irrelevant to copyright law. In *Clean Flicks of Colo.*, the court addressed a similar argument from defendants concerning their service:

The accused parties make much of their public policy argument and have submitted many communications from viewers expressing their appreciation for the opportunity to view movies in the setting of the family home without concern for any harmful effects on their children. This argument is inconsequential to copyright law and is addressed in the wrong forum. This Court is not free to determine the social value of copyrighted works. What is

232. *Id.* at 27.

233. *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 859 (9th Cir. 2017).

234. *Id.*

235. *See* Brief for the Copyright Alliance, *supra* note 224, at 5–6.

236. Gene Maddaus, *Appeals Court Rejects VidAngel's Bid to Overturn Injunction*, VARIETY (Aug. 24, 2017, 10:39 AM), <http://variety.com/2017/biz/news/vidangel-injunction-upheld-appeals-court-1202538011/> [<https://perma.cc/SC99-XNKT>].

protected are the creator's rights to protect its creation in the form in which it was created.²³⁷

VidAngel's consumer demand argument—that families and supporters of VidAngel have shown desire for a filtering service²³⁸—has been previously dismissed by other courts in other cases:

Stripped to its essence, defendant's "consumer protection" argument amounts to nothing more than a bald claim that defendant should be able to misappropriate plaintiffs' property simply because there is a consumer demand for it. This hardly appeals to the conscience of equity.²³⁹

Despite VidAngel's assertion that it is an innocent supplier of clean content in response to a market demand for family-friendly works, it nevertheless unlawfully profits from the creative works and goodwill of others. It thieves with good intention, it claims, filling a market gap that it has no legal right to fill. Market demand for a good or service does not justify illegal activity, and the benevolent thief is still a thief.

D. VidAngel Failed to Seek Exemption for its Services Through the Triennial Rulemaking Process

The triennial rulemaking process was introduced in 2000 as the "Congressional authorized regulatory mechanism for a proprietor of new tech-

237. *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1240 (D. Colo. 2006).

238. Todd Spangler, *Legally Embattled VidAngel Movie-Streaming Site Raises \$10 Million From Fans*, VARIETY (Nov. 10, 2016), <http://variety.com/2016/digital/news/vidangel-raises-10-million-studio-copyright-lawsuit-1201914823/> [<https://perma.cc/6W9J-XXEF>] ("According to VidAngel, nearly 40,000 customers have donated to its legal defense fund, and a total of 7,553 individuals invested in the mini IPO. About 8,000 customers have written letters to federal district court hearing the case explaining why movie filtering is important to them, according to the company. The company touts the support of several religious, conservative and parents' organizations.").

239. *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000).

nology or an individual user to seek a lawful exemption to the anti-circumvention provisions of the DMCA.”²⁴⁰ These proceedings permit “the Librarian of Congress . . . to grant limited exemptions every three years to ensure that the public can still engage in fair and other non-infringing uses of works.”²⁴¹ The DVD CCA and AACCS LA, as the creators and licensors of the CCS and AACCS technologies that encrypt DVDs and Blu-ray discs, have participated in every triennial proceeding since the launch of their respective technologies.²⁴² VidAngel, on the other hand, has never participated in any of these proceedings, nor requested an exemption that would apply to its service.²⁴³ If VidAngel sought to create an exemption for its services, it could have exercised this avenue. However, VidAngel failed to utilize the DMCA’s recognized process, and instead claimed an exemption that was almost certainly not created with the intention of protecting this type of service from circumvention liability.

E. An Alternative: The ClearPlay Model

If VidAngel intends to survive this latest injunction, perhaps it should consider changing its filtering business model. The FMA expressly exempts from liability (1) “individuals who [filter] limited portions of films that they are viewing in their homes,” and (2) “companies who create and provide software or technology to facilitate such activities.”²⁴⁴ As discussed in Part II.C, the FMA was enacted in the wake of litigation against two filtering companies, CleanFlicks and ClearPlay,²⁴⁵ and ultimately carved out a narrow exception “to insulate ClearPlay and similar businesses from copyright liability.”²⁴⁶ Like VidAngel, CleanFlicks filtered out objectionable content by

240. Brief of DVD Copy Control Association, Inc. and Advance Access Content System License Administrator, LLC as Amicus Curiae in Support of Plaintiffs-Appellees at 21, *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848 (9th Cir. 2017) (No. 16-56843).

241. *Id.* at 20.

242. *Id.* at 21.

243. *Id.*

244. Peter S. Menell, *Knowledge Accessibility and Preservation Policy for the Digital Age*, 44 HOUS. L. REV. 1013, 1062 (2007).

245. See Brief for the Copyright Alliance, *supra* note 224, at 23.

246. Menell, *supra* note 245, at 1062.

purchasing DVDs at retail before creating fixed copies of the edited works, and then distributed those copies to the public.²⁴⁷ The difference between CleanFlicks and VidAngel was that CleanFlicks fixed its copies in physical DVDs, whereas VidAngel fixed its copies in its online cloud.²⁴⁸ Another difference was that CleanFlicks sold and rented its filtered physical DVDs, whereas VidAngel streamed the filtered content from its server straight to the public.²⁴⁹ The court found that the FMA did not exempt CleanFlicks's service from copyright infringement, and further enjoined CleanFlicks's business, naming it illegitimate.²⁵⁰

ClearPlay, on the other hand, provided DVD playback equipment that worked in conjunction with the authorized copies of the DVDs that ClearPlay customers had purchased themselves.²⁵¹ ClearPlay did not create fixed copies of works, but rather offered equipment that filtered objectionable portions of the DVDs as they were played in the home of the purchaser.²⁵² ClearPlay won its battle against Hollywood studios in 2005 by distinguishing itself as the filtering model that neither circumvents access controls in violation of the DMCA, nor infringes on the exclusive rights of copyright owners by reproducing fixed copies or publicly performing the works.²⁵³ In support of the Studios, ClearPlay had a law professor at Georgetown University write an amicus brief distinguishing itself from VidAngel and its services.²⁵⁴

247. Brief for the Copyright Alliance, *supra* note 224, at 23–24.

248. *Id.*

249. *Id.*

250. *Clean Flicks of Colo.*, 433 F. Supp. 2d at 1243–44.

251. *See* Brief for the Copyright Alliance, *supra* note 224, at 23–24.

252. *Id.*

253. *Huntsman v. Soderbergh*, No. CIV.A02CV01662RPM MJW, 2005 WL 1993421, at *1 (D. Colo. Aug. 17, 2005); Gene Maddaus, *ClearPlay Is No Longer Offering Filtered Movies to Stream*, VARIETY (Feb. 7, 2017, 3:02 PM), <http://variety.com/2017/biz/news/clearplay-streaming-new-releases-google-shutdown-1201980650/> [<https://perma.cc/S8JQ-RQUJ>].

254. Herb Scribner, *ClearPlay Says it Doesn't Support VidAngel in Streaming Rights Case*, DESERET NEWS (Feb. 23, 2017, 6:25 AM), <http://www.deseretnews.com/article/865674005/ClearPlay-says-it-doesnt-support-VidAngel-in-streaming-rights-case.html> [<https://perma.cc/H7Q8-UJRQ>].

As ClearPlay has demonstrated over 17 years, it is not necessary to circumvent an access control measure, or make unauthorized copies or public performances in order to provide families with effective filtering technology. VidAngel's misinterpretation of the FMA is simply unsupportable either by the plain language or the legislative history, and acceptance of VidAngel's infringing technology would undercut those that have worked within the law to develop compliant technologies.²⁵⁵

F. An Alternative: Legislative Support

VidAngel contends that the legislative history of the FMA indicates that the FMA was not written so narrowly as to apply only to the filtering services that were in existence at the time it was drafted, but that it was written to broadly encompass future filtering technology as well.²⁵⁶ In June 2017, Senator Hatch wrote a letter to Chris Dodd, chairman and Chief Executive Officer of the Motion Picture Association of America, concerning the FMA:

[The FMA] was intended to enable families to use filtering technology to screen out graphic violence, vulgarity, and explicit sexual content from movies and television shows. Crucially, the [FMA] sought to balance the interests of families in screening out objectionable content with the rights of copyright holders. It applies only to filtering technology used on authorized copies of movies and television shows, prohibits viewers from creating boot-leg versions, and does not protect any conduct that impairs core copyright protections.²⁵⁷

In a separate statement, Senator Hatch expressed his belief that it is "essential that we protect content creators' intellectual property rights."²⁵⁸ Additionally, Senator Hatch noted that infringing transmissions of works are

255. Brief for ClearPlay, Inc. as Amici Curiae Supporting Plaintiffs-Appellees at 15, *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848 (9th Cir. 2017) (No. 16-56843).

256. See Brief for the Copyright Alliance, *supra* note 224, at 20–24.

257. Letter from Orrin G. Hatch et al., U.S. Senator, Congress of the U.S., to Chris Dodd, Chairman and CEO, Motion Picture Ass'n of America (June 21, 2017), [https://www.hatch.senate.gov/public/_cache/files/d30ba79d-537c-41f3-8933-2f69a7febae1/Filtering%20Letter_web-site\[1\].pdf](https://www.hatch.senate.gov/public/_cache/files/d30ba79d-537c-41f3-8933-2f69a7febae1/Filtering%20Letter_web-site[1].pdf) [<https://perma.cc/CW3N-8A8T>] [hereinafter Hatch Letter].

258. Herb Schribner, *Hatch on VidAngel's Technology: 'I Want To Find A Way For Everyone To Win On This Issue'* (+video), *Deseret News* (June 21, 2017, 1:35 PM), <http://www.deseretnews.com/article/865683416/Hatch-weighs-in-on-VidAngel-technology-sends-letter-to-MPAA.html> [<https://perma.cc/AX6B-TQ7C>].

not rendered non-infringing by the FMA simply because they omit or filter portions of the original works.²⁵⁹ It is unlikely that Congress would have approved of filtering services at odds with the exclusive rights of copyright holders, since the FMA was “expressly designed not to affect a copyright owner’s” exclusive rights.²⁶⁰ As the Circuit Court noted, the FMA was created with the protection of copyright owners’ intellectual property rights in mind—and the statute itself stated that nothing in its language should be construed or interpreted to imply further rights than those provided.²⁶¹

In 2004, ClearPlay asked Congress to “clarify through appropriate legislation that muting and skipping over copyrighted content, without making an unauthorized copy did not violate the Copyright Act.”²⁶² Congress, in turn, enacted the FMA as part of the Family Entertainment and Copyright Act of 2005, to permit filtering in accordance with its terms.²⁶³ As a result of this legislation, the *Huntsman* court dismissed ClearPlay as a defendant, and kept CleanFlicks as party to the suit, which it eventually enjoined from continuing its infringing services.²⁶⁴ If VidAngel cannot convince a court of its interpretation of the FMA and copyright law, it is free to seek action from Congress as ClearPlay did over a decade ago, to include new filtering technologies that were not covered or comprehended by the FMA at the time it was written.²⁶⁵

G. An Alternative: Content Production

VidAngel could consider branching out to content production. There is a gap in the market for cleaner content, evidenced by the many lawsuits launched by Hollywood studios against companies that offered these ser-

259. 150 CONG. REC. 11,852, at S11,853 (daily ed. Nov. 24, 2004) (statement of Sen. Hatch).

260. *VidAngel, Inc.*, 869 F.3d at 859.

261. *Id.* at 858–59.

262. Brief for ClearPlay, Inc., *supra* note 256, at 1.

263. *Id.*

264. See generally *Huntsman*, 2005 WL 1993421; *Clean Flicks of Colo.*, 433 F. Supp. 2d 1236.

265. Brief for the Copyright Alliance, *supra* note 224, at 20.

vices. VidAngel can capitalize on this demand by creating or producing content that conforms to its company goals. Streaming sites like Netflix and Hulu offer original productions, and assuming VidAngel's true intention is to provide wholesome entertainment to the world, it might consider producing films or series which provide cleaner content to viewers. VidAngel seemingly contemplated this option in 2016, when its CEO Neal Harmon announced that "VidAngel Studios" would be launching in early 2017, "producing 'family friendly' content."²⁶⁶

VII. CONCLUSION

The Circuit Court properly applied the law to VidAngel's case, and preserved the protection that copyright law was created to bestow upon copyright owners and their creative works. VidAngel's services infringed on the Studios' exclusive rights, and its circumvention of the access controls on the works allowed VidAngel to copy and reproduce content that rightfully belonged to the Studios. This type of filtering and streaming cannot be allowed to co-exist in contradiction to everything copyright law stands for. The Copyright Act and the DMCA, as previously noted, do not only protect industry giants like the Studios; they protect every artist, author, and content-producer that strives to make a living and a career out of his or her own expressive works. These works are extensions of their creators, and copyright law grants those creators the power to exercise control over how their works are used, copied, and reproduced. It was the intention of copyright law and the DMCA to shield owners from the very actions that VidAngel sought to legitimize in this case. While VidAngel attempted to liken itself to a harmless provider of cleaner content in response to a market demand for family-friendly works, the reality is that its methods amounted to glorified theft. Popular demand for a service or a good does not justify unlawful activity, and wholesome intentions do not absolve a thief of accountability. Streaming services like VidAngel cannot be permitted to siphon a profit from the creations and goodwill of others. If VidAngel intends to survive as a

266. Maddaus, *Facing a Shutdown Order*, *supra* note 219; *see also* Neal Harmon, *VidAngel Studios' First Theatrical Release in Theaters Today*, VIDANGEL, (Mar. 3, 2017), <http://blog.vidangel.com/2017/03/03/vidangel-studios-first-theatrical-release-in-theaters-today/> [<https://perma.cc/P3KJ-J2NH>] (VidAngel Studios' first theatrical release, "Tim Timmerman, Hope of America," hit theatres on March 3, 2017 as a PG-13 film); VIDANGEL, <https://www.vidangel.com/> [<https://perma.cc/773W-7USH>] (VidAngel boasts "high quality original content" on its website, listing *Life on BitCoin*, *The Last Decent*, *The Ride*, *The Shepherd*, *Tim Timmerman*, *Hope of America*, *My Brother the Time Traveler*, and *Dry Bar Comedy*—"the worlds [sic] largest library of clean comedy[.]"—as productions of VidAngel Studios).

company, it needs to change its streaming service model or appeal to the legislature for modification of filtering rights under copyright law.